United Nations AT/DEC/1107

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1107

Case No. 1211: FACCHIN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 27 January 1997, Brigitte Facchin, a former staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

"II. PLEAS

Applicant respectfully requests the Tribunal to:

...

(b) *Decisions which the Applicant is contesting and whose rescission she is requesting*:

... [R]e-establish the truth in her file, remove the obstacles she continues to encounter when she tries to enter UNOG premises to settle her affairs, pay her salary arrears and reimburse her for medical expenses incurred as a result of the incident of 4 July 1994.

(c) *Obligations the Applicant is invoking and whose performance she is requesting*:

Extension of Applicant's contract beyond 15 July 1994 ... It is requested that Applicant be reinstated ...

(d) *Amount of compensation claimed* ...:

Material loss (effective cost): ... arrears since 15 July 1994, based on the last salary paid ... medical expenses incurred ... plus penalty for late payment; cost of the procedure. Emotional suffering: compensation for the injury sustained.

(e) *Other relief requested in accordance with the Statute*:

Indemnify Applicant for the serious injuries sustained ...

(f) Take appropriate disciplinary action after conducting a proper investigation into the incident that occurred at the Training and Examination Section ...

(g) In accordance with the provisions of ST/AI/292 and IC/Genève/3013, produce the reports of the Training and Examination Section and the Security Service (the "aggressors") which are cited in several documents in Applicant's file and on which all the decisions of the UNOG Administration have been based or, if the Administration maintains that there are no such reports, repair the serious injury Applicant has sustained by reinstating her and compensating her.

(h) Remove from Applicant's file all documents containing inaccurate information, particularly that concerning the incident that occurred at the Training and Examination Section.

..."

Whereas, in its Judgement No. 919 of 23 July 1999, the Tribunal noted that it was up to the Joint Appeals Board (JAB), whose role is essentially to clarify the facts on which applicants base their application, to re-examine as far as possible the circumstances of the incident that occurred in 1994 and any injury resulting therefrom. According to the Tribunal, the JAB should also check to see whether the Applicant's file contained any documents of which she was unaware or that were improperly placed therein. Thus, it referred the claims regarding the 4 July 1994 incident back to the JAB for consideration in light of staff rule 111.3 (d).

Whereas, on 29 June 2001, the Applicant filed a new Application containing pleas which read as follows:

"**C. PLEAS**

Request for Discovery and Witnesses

8. The Applicant has attached ... Requests for the Production of Documents, Written Interrogatories, and Requests for Admission of Facts, all three of which the Applicant respectfully requests the Tribunal to ... forward to the Respondent, with an instruction that same be answered ...

...

10. The Applicant requests that this review be considered solely *in camera*, based ***both*** on written documentation ***and*** an oral hearing(s).

11. The Applicant respectfully requests that the UNAT summon ... witnesses ...

12. The Applicant also requests that [a] record of all proceedings ... be undertaken ...

13. The Applicant [requests] that the Tribunal quash the decision taken by the Secretary-General ... accepting the conclusions of the JAB ...

Redress Sought

14. The Applicant respectfully requests that the UNAT order the Secretary-General to provide further redress ... as detailed below:

...

- the reintegration of the Applicant into the UN system with full retroactive effect ...

- the award to the Applicant of $15,000 in respect of costs and expenses ...

- the award ... of moral damages in an amount equal to at least five (5) years ... salary at the time of her impugned non-renewal

- the award ... of damages in an amount equal to at least two (2) years ... . salary for the undue and inexplicable delay ... in the adjudication of her appeal

- payment of all outstanding medical expenses ...

- interest on any monetary damages awarded ... calculated at the market rate from 15 July 1994 ...

- such other relief as the [Tribunal] deems necessary, just and equitable.

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2002 and periodically thereafter until 31 August 2002;

Whereas the Respondent filed his Answer on 28 August 2002;

Whereas the Applicant filed Written Observations on 15 November 2002;

Whereas, on 25 June 2003, the Applicant submitted an additional document;

Whereas, on 2 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case additional to the statement of facts contained in Judgement No. 919 are as follows:

On 13 April 1994, the Applicant's supervisor transmitted to the Training and Examinations Section (TES), her application for enrolment in the Russian level 4/5 language course.

Between the beginning of April 1994 and 3 May, the Applicant was advised, several times, that she was not eligible to attend the level 4 Russian class until she passed the examination for the course she had taken last term, Russian level 3 advanced.

On 9 May 1994, the Chief, TES, drew the attention of the Special Assistant to the Executive Secretary, Economic Commission for Europe (ECE), to the Applicant's unauthorized attendance to the level 4 Russian course. He explained that the Applicant did not meet the eligibility criteria for two specific reasons, namely her contract was due to expire on 30 June and she had refused to take the compulsory end of term examination. He therefore requested that the Applicant be instructed to stop attending classes. On 13 May 1994, the Applicant was so instructed.

On 8 June 1994, the Applicant was convoked to sit the Russian end-of-term examination (level 3 advanced), to take place on 9 June for the oral part, and 10 June for the written part. On 9 June the Applicant came to the Secretariat saying that she did not feel well and that she would not be able to take the oral part of the examination as planned. On Friday, 10 June 1994, she took the written part of her examination. The oral part of the examination was rescheduled for 14 June 1994, but on that date the Applicant again refrained from taking the test.

By memorandum dated 28 June 1994, the Training Officer, TES, advised the Chief of Personnel, United Nations Office at Geneva (UNOG), that the Applicant had been attending the Russian level 4 class since the beginning of the term despite being ineligible to do so; that she had now applied for the September 1994 term level 5 class; and, that no contract extension beyond 30 June 1994 had been requested for the Applicant. She thus requested that the Applicant be barred from attending any Russian classes at the United Nations unless, and until, she met the eligibility requirements. In a hand-written note dated 29 June 1994 on the above-mentioned memorandum, the Chief of Personnel, UNOG, agreed with the request.

On 4 July 1994, when the Applicant went to the Villa Le Bocage to attend the level 4 Russian class, the Training Officer, TES, and two Security Guards tried to

prevent the Applicant from attending the class. The Applicant nevertheless attended the class, but her bags remained outside the classroom.

On 5 July 1994, one of the Security Guards reported the incident to the Chief of Security. On the same date, the Applicant wrote to the Chief of Security, claiming that someone had had access to the contents of her handbag and had copied documents. On 8 July 1994, the Chief of Security replied to the Applicant, stating that no one had at any time searched her handbag.

On 15 July 1994, the Applicant separated from service.

By memorandum dated 19 July 1994, the Chief of Security reported the 4 July 1994 incident to the Director of Administration.

On 28 July 1994, the Applicant transmitted to her former supervisor her "Account of [her] participation in the UN Russian course and [...] Preliminary Summary Account of the Incident at Villa Le Bocage". On 4 August 1994, the Chief of Personnel, UNOG, transmitted her written comments thereon to the Director of Administration.

On 8 August 1994, the Applicant submitted a notification of service-incurred accident, in connection with the incident of 4 July 1994, indicating that "When I tried to go to the class-room for my Russian class [the Training Officer] grabbed my right wrist firmly and pushed me down the stairs. I barely avoided a fall, stumbling downwards. Later, a UN security guard withheld my right wrist for a prolonged period of time". She also named a number of witnesses. She enclosed an unpaid invoice (CHF 228.25) of the Hôpital de la Tour "for direct settlement" by the United Nations. Following several more such requests for settlement, in March 1996, the invoice was paid directly by the Compensation Claims Office, as an exception to the normal procedures.

By memorandum dated 18 August 1994, the Applicant addressed a "formal complaint" to the Director-General, UNOG, for mistreatment from TES (i.e. incident of 4 July), on the one hand, and, on the other hand, mistreatment from UNOG Administration, i.e. her ban on entering the Palais; the alleged "slanderous hearsay" by the Director of Administration; and, the alleged adverse material included in her personal file without having been shown to her.

By memorandum dated 4 November 1994, the Director, Division of Administration, indicated to the Chief of Personnel, UNOG, that the incident was

serious; that this was a clear case of insubordination on the part of the Applicant; but, that the Applicant should be allowed to see the "adverse material" allegedly placed on her file.

On 10 November 1994, the Applicant received a reply to her formal complaint of 18 August 1994 to the Director-General, UNOG: a careful review of her Official Status file had not revealed any adverse material having been placed therein; the note dated 4 August 1994 form the Chief of Personnel, UNOG, would be placed in her file; and, while the incident of 4 July 1994 was unfortunate, he considered her case closed.

On 15 May 1995, the Security and Safety Section transmitted a summary of the incident at the Villa le Bocage to the Officer-in-Charge of Compensation Claims, in accordance with established procedures. The report concluded that no force was used against the Applicant.

On 26 June 1995, the Applicant wrote to the Director-General, UNOG, requesting, inter alia, that a number of documents relating to the incident be removed from he Official Status file.

On 10 May 1996, the Chief of Personnel, UNOG, advised the Applicant that the Administration did not have the alleged reports from Security and from TES. The Applicant replied on 21 May, again requesting that these documents be included in her file.

On 27 January 1997, the Applicant filed an application with the United Nations Administrative Tribunal. The Tribunal rendered Judgement 919, on 23 July 1999, deciding, inter alia, that the Applicant's claims relating to the incident of 4 July 1994 be remanded to the JAB.

The JAB adopted its report on 17 November 2000. Its considerations and conclusions read, in part, as follows:

"**Considerations**

Incident of 4 July 1994

The Tribunal first requested the JAB to examine the circumstances of the incident of 4 July 1994 and to determine if any damages had resulted therefrom

...

...

99. It appears ... that the intervention of two Security Officers (...) at the Villa le Bocage on 4 July 1994 was the direct consequence of, and was fully justified by, the Appellant's behaviour and failure to observe the rules. In her versions of the facts, the Appellant always deliberately concealed the background of the incident.

...

104. There is ... no evidence that the Security Officers exceeded their authority and violated the Appellant's rights in the course of their intervention at the Villa Le Bocage, on 4 July 1994.

...

106. The Panel notes that following the incident, the Appellant submitted a claim for service-incurred accident, together with an unpaid medical bill (CHF 228.25) from the Hôpital de la Tour, "for direct settlement" by the United Nations. ... [T]he Organization made an exception to its own rules and paid directly the medical bill to the Hospital.

107. In the light of its foregoing considerations concerning the circumstances leading to the incident and the very facts of the incident, the Panel concludes that the Appellant cannot claim any damage as a consequence of the incident of 4 July 1994.

Official Status File

108. The Tribunal also requested the JAB to verify whether the Appellant had had access to all the documents contained in her Official Status File and whether any documents had been wrongfully inserted therein ...

...

112. In the Panel's view, none of the documents included in the Appellant's [Official Status File] constitute 'adverse material' within the meaning of ST/AI/292 of 15 July 1982, 'Filing of adverse material in Personnel records'. ...

113. ...[T]he Panel also tried to obtain documentation not included in the [Official Status File], namely the two reports which the Appellant [had] requested ...

114. Concerning the report written by the Chief of Security, the Panel obtained it. ... The Security Section also provided to the Panel the report addressed to the Chief of Security [of] 5 July 1994.

115. Concerning [the TES] report, the Panel raised the possibility that such report may in fact have never existed ... It is the Appellant who started to refer to two different reports, without the least indication that there were indeed two reports.

...

Conclusions

118. In the light of the foregoing, the Panel **concludes** that the incident of 4 July 1994 was the result of the Appellant's behaviour and disregard both of applicable rules, and of clear and legitimate instructions given to her not to attend the Russian classes.

119. The Panel also **concludes** that there is no evidence that the Security Officers exceeded their authority and violated the Appellant's rights in the course of their intervention at the Villa Le Bocage, on 4 July 1994.

120. Accordingly, the Panel **concludes** that the Appellant cannot claim any damage caused by the incident of 4 July 1994.

121. In addition, the Panel **concludes** that the Appellant had access to all the documents contained in her Official Status File and that no document was wrongfully inserted therein."

On 10 January 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the JAB's findings and conclusions and had decided to take no further action on her case.

On 29 June 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB and the Secretary-General failed to conduct a full, proper and impartial inquiry into the incident of 4 July 1994.

2. The JAB and the Secretary-General failed to provide the Applicant with disclosure of the documents on which the impugned decision is based.

3. The Respondent withheld the results of the alleged investigation and relied upon evidence which was not previously disclosed to the Applicant, thereby denying her the opportunity to put forward any arguments in her favour.

4. The JAB violated the Applicant's due process rights.

Whereas the Respondent's principal contentions are:

1. As the Tribunal decided that the Applicant's appeal against the non-renewal of her contract beyond 15 July 1994 was time-barred, the Respondent submits that the request for "retroactive re-integration" in the service of the Organization has no valid basis, and should be rejected.

2. The Respondent submits that the incident was the result of Applicant's deliberate non-compliance with the Organization's rules and clear instructions of UNOG officials.

3. The Respondent submits that, in the circumstances, the Administration properly and justifiably requested the intervention of UNOG security officers in preventing Applicant from attending the Russian class on 4 July 1994.

4. As the Organization paid the Applicant's hospital bill directly to the hospital, and in the absence of evidence that UNOG security officers violated her rights, the Respondent submits that she cannot claim any damages as a result of the incident.

5. None of the documents included in the Appellant's Official Status file constitute adverse material within the meaning of ST/AI/292.

The Tribunal, having deliberated from 2 to 21 July 2003, now pronounces the following Judgement:

I. The Applicant requests the Tribunal to quash the decision of the Respondent to accept the conclusions of the JAB, claiming that the JAB failed to conduct a legitimate and meaningful investigation into the 4 July 1994 incident whereby the Applicant allegedly was forcefully ejected from "Villa le Bocage", while trying to attend Russian language classes.

II. The Tribunal noted in its Judgment No. 919, *Facchin* (1999) that it was up to the JAB, to re-examine, as far as possible, the circumstances of the incident that occurred in July 1994 and any injury resulting therefrom, and that the JAB should check to see whether the Applicant's file contained any documents of which she was unaware or that were improperly placed therein. Thus, the Tribunal referred the claims regarding the 4 July 1994 incident back to the JAB, for consideration in light of staff rule 111.3 (d). The Tribunal found time-barred the appeal not to renew her contract.

III. The JAB found that the Applicant attended level 4 Russian classes despite clear and repeated instructions that she was not authorized to do so. This was because of the fact that her contract was due to expire on 30 June 1994 (she actually separated from service on 15 July) and her refusal to take the compulsory end of term examination for the prior level.

As for the 4 July incident and whether the two Security Officers abused their authority in the course of their intervention or acted improperly towards the

Applicant, the JAB found no evidence that such had been the case. In this regard, it found no reason to doubt the veracity of Sergeant Geiser's 5 July 1994 report to the Chief of Security. That same report was given to the Applicant for comment: the JAB noted that the Applicant does not contradict the Security Officer's version of the facts. There is, therefore, no evidence that the Security Officers exceeded their authority or violated the Applicant's rights in the course of the incident.

IV. The Applicant claims that the JAB did not address her complaint of having sustained injuries, when the Security Officers, without provocation and utilizing excessive force, twisted her wrist and "pushed me down the stairs". This caused her both moral and physical injury, as evidenced by the medical bill which she submitted for payment to the Administration.

V. Furthermore, the Applicant contends that many documents cited by the JAB had never been disclosed to her, thus denying her the opportunity to comment on same, thereby violating her fundamental due process rights. Most important was the critical report from Security and Training regarding the incident which, she alleges, was not made available to her despite her repeated requests. She argues that the Tribunal has held in many instances, that the mere fact of placing documents in a staff member's personnel file without proper notification causes that staff member damage and violated his or her rights, requiring compensation.

The Tribunal notes that the JAB, in this regard, was not convinced that such a report actually existed: it "raised the possibility that such report may in fact have never existed ... It is the Appellant who started to refer to two different reports, without the least indication that there were indeed two reports".

VI. The Tribunal must now determine whether the Applicant sustained any damage or injury as a result of 4 July incident

The Applicant submits that the fact that the Administration paid her medical bill supports her claim. The Applicant submitted a claim for a service-incurred accident, together with an unpaid medical bill (CHF.228.25). The Tribunal finds that the Organization, in view of the repeated refusals of the Applicant to settle the bill, paid the bill directly to the hospital, as exception to normal procedures. This

does not amount to evidence that the Organization was responsible for the injury, as claimed by the Applicant. Thus, this claim is rejected.

The Tribunal notes that both security reports, dated 5 and 19 July 1994, as well as the routine report of 15 May 1994 addressed by another Security Officer to the Officer-in-Charge of Compensation Claims, state that violence was not used against the Applicant. Witnesses named by the Applicant also confirmed that the Applicant had not been harmed. Therefore, in the absence of evidence that the Security Officers used excessive force or violated her rights, the Applicant cannot claim any damages, and this claim is also rejected.

VII. The claim of the Applicant that her file contains documents of which she was unaware, or that were improperly placed therein, must also fail. The Tribunal observes that the JAB found no such documents in the Official Status file. Moreover, the Applicant herself stated, in her letter dated 1 February 1995 to the Chief, Personnel Services, that she had not been able to detect any adverse material in her Personnel file that should impede her further employment by the United Nations. In fact, shortly after her contract expired with UNOG, the Applicant was granted a contract at UN Headquarters.

VIII. On the other hand, the Tribunal finds that despite repeated requests from the Applicant for the memorandum dated 4 November 1994 from the Director, Division of Administration to the Chief, Personnel Service, it was neither made available to the Applicant, nor placed in her file. The said memorandum states, inter alia, that, "It is natural for management to ... ask itself why one would continue to employ on a temporary basis someone who causes so much unnecessary trouble". The Tribunal concurs with the Applicant that the memorandum contains adverse material and she was entitled to see it before presenting her response to the JAB. Thus, the failure of the Administration to provide the 4 November memorandum to the Applicant constitutes a denial of the Applicant's due process rights. Therefore, the Tribunal maintains that the Applicant is entitled to compensation.

IX. In view of the foregoing the Tribunal:

1. Orders the Respondent to pay the Applicant $1000 as compensation for denial of due process; and,

2. Rejects all other claims.

(Signatures)

Julio **Barboza**
President

Omer Yousif **Bireedo**
Member

Spyridon **Flogaitis**
Member

Geneva, 21 July 2003

Maritza **Struyvenberg**
Executive Secretary

/PACCHIN